

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-6291-99
DTonuzi

date:

to: Chief, Examination Division, Manhattan District
Attn: Jim Butler

from: District Counsel, Manhattan District, New York

subject:

EIN: [REDACTED]

Tax Year: [REDACTED]

Statute of Limitations Expires: [REDACTED]

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This is in response to your request for advice concerning the issue of who is the proper party to sign the Form 872 for [REDACTED], the common parent of a consolidated group, for the tax year [REDACTED]. This advice supplements our prior advice dated July 22, 1997, a copy of which is attached. We have coordinated this issue with Ken Casey of the Procedural Litigation Branch of Field Service. This advice is subject to the 10-day post review procedure. Therefore, no action should be taken based on this advice until the National Office has had the prescribed 10-day period to review and approve the advice.

Issue

Who should execute a Consent to Extend the Time to Assess Tax (Form 872) to extend the statute of limitations on assessment for [REDACTED] (" [REDACTED] "), a consolidated group that was merged into [REDACTED] and no longer exists, for the taxable year [REDACTED] and how should the name of [REDACTED] be stated in the Form 872.

Conclusion

[REDACTED], as the successor of [REDACTED], is the proper party to execute the Form 872 extending the statute of limitations for the taxable year [REDACTED]. In addition, [REDACTED] and [REDACTED], as transferees, are proper parties to execute Forms 977 extending the statute of limitations for transferee liability for the taxable year [REDACTED].

Facts

We base our opinion on the limited facts provided that are set forth in our earlier attached memorandum dated July 22, 1997, marked as Exhibit 1, and the additional facts more recently provided, as set forth below. If any of the below listed facts are inaccurate or incomplete, please so notify Drita Tonuzi or our office immediately.

Merger of [REDACTED] into [REDACTED]

In [REDACTED], [REDACTED], a Delaware corporation, and Subsidiaries (" [REDACTED] ") were acquired by [REDACTED] in a stock acquisition. On or about [REDACTED], [REDACTED] was sold to [REDACTED], a Delaware corporation and common parent of the consolidated group of [REDACTED] and Subsidiaries. However, [REDACTED] was not included in the consolidated return filed by [REDACTED] for tax year [REDACTED]. For the taxable year [REDACTED], [REDACTED] filed a separate Form 1120.¹ In [REDACTED], [REDACTED] was in the consolidated group of [REDACTED].

On [REDACTED], [REDACTED] was merged into [REDACTED], a New York corporation and a wholly owned subsidiary of [REDACTED] under the provisions of I.R.C. § 368(a)(1)(A).

¹ Under Treasury Regulation 1.1502-76(a)(5), in effect during the taxable year [REDACTED], if a corporation became a member of a consolidated group within the last 30 days of a taxable year, it had the option of not being included in the consolidated group for such taxable year. For this reason, [REDACTED] was not included in [REDACTED]'s consolidated return for the taxable year [REDACTED].

After the merger, [REDACTED] ceased to exist and [REDACTED] was the surviving corporation and a subsidiary of the consolidated group of [REDACTED].

Mergers and Name Change of [REDACTED]'s Common Parent

On [REDACTED], [REDACTED] was merged into [REDACTED], a Delaware corporation and its wholly owned subsidiary under the provisions of I.R.C. § 368(a)(1)(A). Thereafter, [REDACTED] ceased to exist and [REDACTED] was a wholly owned subsidiary of [REDACTED], the new common parent. On or about [REDACTED], [REDACTED] merged with [REDACTED], a Delaware corporation, under the provisions of I.R.C. § 368(a)(1)(A). Thereafter, [REDACTED] ceased to exist and [REDACTED] continued to be a wholly owned subsidiary of [REDACTED]. [REDACTED] was wholly owned by [REDACTED], a French corporation.

On [REDACTED], [REDACTED] changed its name to [REDACTED] effective [REDACTED]. As more fully discussed, [REDACTED] continued to be a part of the consolidated group of [REDACTED] and Subsidiaries until [REDACTED].

The Sale of [REDACTED]

On [REDACTED], [REDACTED] sold its [REDACTED] business, including [REDACTED], to [REDACTED], a French corporation. We have only been provided with an excerpt of the sales agreement between [REDACTED] and [REDACTED], a copy of which is attached as Exhibit 2. The Closing of this transaction occurred on [REDACTED]. We have not been provided with any closing documents. Although the excerpt of the sales agreement indicates that the sale was intended to be made under I.R.C. § 338, we have been advised that the parties treated this transaction as a fully taxable stock sale.

The excerpt of the sales agreement includes Exhibit 8.1(b), which discusses tax returns and indemnity matters relating to the US Subsidiaries, including [REDACTED]. The excerpt of the sales agreement does not specifically discuss [REDACTED]'s tax liability for the taxable year [REDACTED] or for the taxable years prior to the closing date.

The terms of the sales agreement suggest that [REDACTED] accepted liability for [REDACTED]'s liabilities for tax periods ending on or prior to the closing. In pertinent part, Exhibit 8.1(b) paragraphs 2.(a) and (b) provides that the seller, [REDACTED] shall have no liability and the purchaser, [REDACTED] shall indemnify and hold [REDACTED] and Affiliates harmless from any and all taxes resulting from "(iii) any position taken by, or

a filing made by, any U.S. Subsidiary [e.g.,] or the Purchaser [] on or after the Closing Date for any taxable period that could affect the Tax liability of the U.S. Subsidiary for periods ending on or prior to the Closing Date." Thus, [] is liable for []'s tax liabilities prior to the closing, including the [] tax liability of []. Paragraph 2.(c) of Exhibit 8.1(b), which provides that [] must pay to [] any refund or credit received for tax periods of the U.S. Subsidiaries ending on or before the closing, further supports our interpretation that [] accepted liability for []'s [] liability. However, [], as successor of [], continued to be liable for the [] tax liability. See Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839 (1985).

Based upon our prior advice of July 22, 1997, you secured from [], as the successor of [], a Form 872, extending the assessment statute for the taxable years [] and [] to [] and a Form 977 extending the assessment statute for transferee liability for the same taxable years to []. At the same time, you also secured from [] a transferee agreement (Form 2045) for the same taxable years. Copies of the Forms 872, 977 and 2045 are attached as Exhibit 3. These documents were signed by [], the [] of Tax for [] and []. [] is no longer the [] for [].

Lastly, [] continues to conduct business in the United States and to maintain an office at the same New York location as it did prior to the closing date. Therefore, it appears a consent to extend the statute of limitations may be easily obtained from [].

Analysis

Under I.R.C. § 6501(c)(4), the usual 3-year statute of limitations on assessment may be extended by a written agreement of the parties. Such an extension of the statute of limitations on assessment is effected through the execution of a Consent to Extend the Time to Assess Tax (Form 872). Rev. Proc. 82-6, 1982-1 C.B. 409; Rev. Proc. 72-38, 1972-2 C.B. 813; Rev. Proc. 69-8, 1969-1 C.B. 399.

The regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents. Under Revenue Procedure 83-41, 1983-1 C.B. 349, the Service generally applies the same rules applicable to the execution of returns, i.e., I.R.C. § 6062, to consents to extend the assessment statute of limitations. Revenue Procedure 83-41 provides that in the case of a corporation, the consent may be executed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other

officer duly authorized to act. Any such officer may sign a consent even if such person did not sign the return. Id. Revenue Procedure 83-41 further provides that no one may sign a consent for the corporation where a corporation's existence is terminated.² In states where directors are authorized to act for a dissolved corporation, any one or more of the directors may sign the consent for the corporation. Rev. Proc. 84-165, 1984-2 C.B. 305. However, shareholders liable under I.R.C. § 6901 as transferees may sign consents for their own liabilities. Id.

Thus, based on the facts presented, [REDACTED] is the proper party to execute a Form 872, as the successor of [REDACTED], for the taxable year [REDACTED]. Pleasanton Gravel Co., 85 T.C. 839 (1985). Moreover, [REDACTED] is also secondarily liable for [REDACTED]'s [REDACTED] tax liability as a transferee. Therefore, [REDACTED] is a proper party to execute both Form 872 and Form 977 for the taxable year [REDACTED].

The Form 872 should read as follows: (Top of the Form 872)
"[REDACTED] (EIN) as successor in interest to [REDACTED] (EIN)*." We recommend that on the front of the Form 872 the asterisk should refer to the following: "* This is with respect to the tax liability of [REDACTED] (EIN) for the taxable year [REDACTED]." In addition, the signature block on page 2 of the Form 872 should be signed as follows: "[REDACTED], as successor in interest to [REDACTED]." The block should be signed by a current officer of [REDACTED]. As to the Form 977, you may use the same language that you previously used.

In addition, [REDACTED] has accepted liability for the tax liabilities of [REDACTED] for periods ending on or before the closing on [REDACTED]. The [REDACTED] tax liability for [REDACTED] is a liability for which [REDACTED] is liable. Therefore, a Transferee Agreement (Form 2045) and a Form 977 should be secured from [REDACTED], if possible.

General Matters

As a final matter, we recommend that you pay strict attention to the rules set forth in the Internal Revenue Manual ("IRM"). Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit the extension, and IRM 4541.1(8) requires use

² Temporary Regulation § 1.1502-77T, which applies to consents in the case of a consolidated group, does not apply in this case because [REDACTED] was not part of the [REDACTED] consolidated group for the taxable year [REDACTED], but rather filed a separate return.

of Letter 929(DO) to return the signed extension to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event an extension becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, please note that § 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Internal Revenue Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Internal Revenue Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the statute extension. Alternatively, you may advise the taxpayer orally or in some other written form of the provisions of I.R.C. § 6501(c)(4)(B). In any event, you should document your actions in this regard in the case file.

We again remind you that this advice is subject to review by the National Office. As discussed on page one, we will contact you within two weeks of the date of this memorandum to discuss any comments the National Office may have regarding this advice.

If you have any further questions, please contact Attorney
Drita Tonuzi (212) 264-5473, extension 244.

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